IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6945 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BABULAL GULABCHAND MODI - Petitioner(s)
Versus
SIDDHPUR NAGARPALIKA & 1 - Respondent(s)

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Appearance :
MR MB FAROOQUI for Petitioner(s) : 1,
MR PRAKASH K JANI for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2,
MR HIMANSU M PADHYA for Respondent(s) : 2,
MS NIRALI B MUNSHI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 27/07/2006

ORAL JUDGMENT

1. The petitioner has approached this Court for appropriate writ for directing the Municipality

to honour and fulfill its own Resolution No. 98 dated 28.11.1995 as well as the Resolution dated 02.09.1996 as directed by the Dy. Secretary of the State Government for regularising the allotment of the land in question to the petitioner.

2. Heard Mr. Farooqui, learned Counsel for the petitioner and Mr. Jani, learned Counsel for respondent No. 1.

3. Upon hearing the learned Counsel appearing for both the sides, it appears that there is no dispute that the Resolution was passed by the Municipality. There is also no dispute on the point that the petitioner paid the amount of Rs. 7,200/-. The case of the petitioner is that as the decision was taken by the Municipality to regularise the encroachment and the Municipality having received the development charge, it was required for the Municipality to allow the petitioner to continue over the said place. Mr. Farooqui, learned Counsel appearing for the petitioner also during the course of the hearing submitted that as per his instruction, pending the petition, the cabin of the petitioner is removed by the Municipality and therefore the petitioner may be allowed to reoccupy the place, and the cabin, which is in custody of the Municipality may also be given back to the petitioner.

4. Mr. Jani, learned Counsel appearing for the respondent Municipality submitted inter alia that in view of the decision of this Court in Special Civil Application No. 6409 of 2005 and allied matters dated 08.04.2005, where, one of the person was respondent No. 2 herein, who was originally occupying the place, the Municipality is not in a position to allot the land. He further submitted that the Division Bench vide order dated 25.03.2005 in Letters Patent Appeal No. 449 of 2005 in Special Civil Application No. 603 of 2005 has restrained the Government and all local bodies(Nagarpalikas, Municipal Corporations, Panchayats) from alienating the public property to the encroacher and therefore, he submitted that the land cannot be reallocated to the petitioner nor the possession of the petitioner can be regularised and therefore he submitted that this Court may dismiss the petition.

5. It appears that for the very Municipality, in the case of more or less similarly situated persons, this Court, in its order dated 08.04.2005 in Special Civil Application No. 6409 of 2005 and allied matters observed as under :

> “Having considered the above, it is required to be recorded that as per the proviso to Section 65(2) of the Act no permission can be granted by the Municipality for allotment of the land which is part of the street or part the road.

The resolution of the Municipality dated 30.7.1976 shows that all the cabins of the petitioners are located on the public street. The said resolution is produced by the petitioners at Annexure "B" to SCA No.6424/2005. Therefore, when as per the statutory provisions there is no power with the Municipality to allot the land, at the most the allotment made to the petitioners at the relevant point of time can be said as on licence basis and it is not even the case of the petitioners that the allotment was made on permanent basis. If the allotment is made on licence basis, the petitioners, as of right, cannot assert that they should be allowed to remain on the public road or street permanently even if the Municipality is desirous to terminate the licence and to remove the petitioners for the purpose of making the road available to the public. The reliance placed upon the provisions of Section 150 and 171 of the Act is ill-founded, because the land admittedly as per the resolution is a part of public street and there is no question of widening of the public street, nor the same is part of drain. Therefore, the action of the Municipality cannot be said to be illegal or arbitrary.

The assertion on the part of the petitioners that unless and until the alternative land is provided to the petitioners, the Municipality cannot take action for removal is also ill-founded and is not supported by any provisions of law. The policy of the Government even otherwise also cannot be said to have any statutory force, if the licence is granted for occupying a place which is part of public road and if the licence is terminated, the licensee cannot assert as of right that unless and until alternative land is provided, he cannot be evicted or he can stick to that place. Even the correspondence which is dated 16.6.2001 addressed by the Collector to the City Survey Superintendent, copy whereof is produced at Annexure "D" in SCA No.6424/2005 shows that it pertains to regularisation of encroachment of 48 cabin

> holders some of them are petitioners herein. Therefore, if the case of the petitioners is considered as it is, the position of the petitioners as per the communication of the Collector, is as encroacher over public road. If the contention from the encroachers of public property is entertained on the ground that unless and until alternative land is provided they cannot be removed, the same would result into encouraging the citizens to encroach public property. In my view, the power under Article 226 of the Constitution of India cannot be exercised for providing aid or protection to those who have encroached over the public property and when the exercise of such power may result against larger public interest."

6. As such, the petitioner was initially not allotted the area but, he was paying the rent to respondent No. 2, who was claiming the right and he was as stated in the affidavit-in-reply, one of the petitioner in the group of petition, which came to be considered by this Court as per the aforesaid order. Therefore, so far as the land in question is concerned, if for the original allottee, respondent No. 2 herein, no right is read by the Court and the petitions are dismissed for allotment of the very land and/or for the alternative land/site too, the petitioner cannot have better right than him. Even otherwise also, even if the contention of the petitioner is examined independently as if the Municipality allotted the land to him or that the possession of the petitioner was allowed to be regularised by receiving an amount of Rs.7,200/, then also, it is not the case of

the petitioner that the land is not the part of public road or a public property and therefore the position qua rights of the petitioner would be the same.

7. Further, the view expressed by the Division Bench of this Court in its decision dated 25.03.2005 in Letters Patent Appeal No. 449 of 2005 has observed as under :

> “While dismissing the appeal, we deem it proper to take suo motu cognizance of the fact that in large number of cases the public bodies are alienating public properties in disregard of the statutory provisions and public interest and though guilty of violation of the mandate of the statute, are not proceeded against by superior authorities. Alienation of the property made by Administrator of Nagar Palika, Dhanera prima face appears to be tainted with malafide. We are informed that in large number of similar cases the local bodies have been alienating public properties and thereby causing financial loss to the units of self Government. It is, therefore, appropriate that the issue is examined by the Court in a larger perspective in public interest. Therefore, the learned Government Pleader is directed to take notice of this order and assist the court.
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> Secretary, Urban Development and Urban Housing Department, Gujarat as well as Secretary, Panchayats, Gujarat are directed to file their affidavits giving details of the policies, circulars, resolutions, decisions taken by the Government of Gujarat for regularising the encroachment on public property and/or alienation of public properties to encroachers. Director of Municipalities is

> also directed to file affidavit clearly stating as to what action has been taken against erring Administrator and Chief Officer of Dhanera Nagarpalika. The needful be done within five weeks. In the meanwhile, the Government of Gujarat and all local bodies (Nagarpalikas, Municipal Corporations and Panchayats) are restrained from alienating public properties to the encroachers."

8. Therefore, it cannot be asserted by the petitioner as of right that even if the Resolution of the Municipality was in breach of the statutory provisions of the Gujarat Municipalities Act or was dehors its power to dispose of the public property or land which is a part of public road or street, the Municipality should be directed to implement its Resolution. Therefore, considering the aforesaid facts and circumstances, I find that it is not a case where this Court would issue a mandamus to the Municipality to act as per the Resolution passed by the Municipality. So far as the amount paid by the petitioner of Rs. 7,200/- is concerned, in case if the cabin of the petitioner is already removed, the same is required to be refunded to the petitioner because the Municipality otherwise cannot retain the benefit accrued to it due to the so-called Resolution. Further, as in any case, the cabin of the petitioner is already removed, the question may not arise for restoration. However, the petitioner would be entitled to the possession of the cabin if the same is in the

custody of the Municipality.

9. In view of the aforesaid observations and discussions, the petition is dismissed for the prayer made in the petition so far as it relates to directing the Municipality to implement its Resolution. However, it is directed that if the petitioner makes the application for refund of the amount of Rs. 7,200/- and the return of the cabin, the same shall be considered by the Municipality and if the amount is not refunded or the cabin is not returned, the same shall be refunded and returned within a period of 15 days from the receipt of such an application.

10. The petition is disposed of accordingly. Subject to the aforesaid directions. Rule discharged. Considering the facts and circumstances, no order as to costs. D.S. to respondent No.1.

(JAYANT PATEL, J.)

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